

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

OKed
PL-II
29865

FILE:

B-214225.2

DATE:

November 28, 1984

MATTER OF: Amarillo Aircraft Sales & Services, Inc.--
Request for Reconsideration

DIGEST:

1. Where protester in its request for reconsideration includes a new ground of protest raised more than 10 working days after protester knew or should have known the basis for it, such ground is untimely and provides no reason to reverse or modify a prior decision.
2. GAO will not reverse or modify a prior decision where the protester fails to provide in its request for reconsideration new evidence or legal arguments which show that the decision was erroneous.

Amarillo Aircraft Sales & Services, Inc., requests that we reconsider our decision in Amarillo Aircraft Sales & Services, Inc., B-214225, Sept. 10, 1984, 63 Comp. Gen. ___, 84-2 C.P.D. ¶ 269, wherein we denied Amarillo's protest against the decision of the Defense Logistics Agency (DLA) to terminate its requirements-type, fixed-price with economic price adjustment (EPA) contract, with Amarillo for the supply of aviation gasoline and JP-4 jet fuel at Amarillo Air Terminal, Amarillo, Texas. We affirm the decision.

In our prior decision, we noted that the government was required to assure itself under the solicitation that any award would result in the probable lowest ultimate cost to the government. For contracting officials reasonably to determine which proposal was most likely to offer the lowest ultimate cost, the proposals had to be susceptible of evaluation on a common basis. Since Amarillo and Pride Refining, Inc., the only other offeror, had submitted proposals which included EPA reference prices referencing different markets, we were unable to conclude

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that contracting officials acted unreasonably in determining after award that the award had been improper because there was no reasonable assurance that award to Amarillo would result in the lowest ultimate cost to the government.

We also considered in our prior decision Amarillo's argument that any problem in evaluating which proposal offered the lowest ultimate cost was irrelevant because Pride, a manufacturer of refined petroleum products, had excluded from consideration the EPA reference prices it had submitted as a manufacturer and thus its offer could not have been accepted. Pride had initially submitted reference prices both under the solicitation's EPA provisions for manufacturers, selecting as its reference price for JP-4 a price based upon an average market price for gasoline and fuel oil as quoted in Platt's Oilgram, and under the EPA provisions for fixed base operators/refueling agents. Although Pride in its best and final offer had cited as its reference prices those initially offered as a manufacturer, on September 1, 1983, Pride dispatched a telex to contracting officials in which it stated that escalation under the contract would be in accordance with the EPA provisions for fixed base operators/refueling agents rather than those for manufacturers. Pride explained in a May 24, 1984, letter to our Office that it had been urged to send the telex by contracting officials on the ground that Pride intended to rely upon a local refueling agent at the air terminal. Pride subsequently submitted on September 22, 1983, an update of its EPA reference prices which did not expressly indicate whether the reference prices then submitted reflected changes in those previously submitted as a manufacturer or those submitted as a fixed base operator/refueling agent.

We noted in our decision that DLA had failed to dispute Pride's explanation of the September 1 telex. We also noted that the agency had informed us that the September 22 updated reference price for JP-4 was based upon the Platt's Oilgram price, as modified by changes in the intervening months, previously submitted as a manufacturer and that the agency therefore evaluated Pride as a manufacturer.

We concluded that we need not determine whether Pride's best and final offer was acceptable as modified since--

"Under these circumstances, where (1) Pride was known to be a manufacturer and had certified itself to be such, (2) Pride submitted with its best and final offers the reference prices selected as a manufacturer, (3) Pride's updated reference price for JP-4 tracked the changes in the reference price for JP-4 based upon the readily available Platt's Oilgram, (4) the confusion as to whether Pride's offer was submitted under the EPA provisions for manufacturers or under those for fixed base operators/refueling agents apparently resulted in large part from erroneous advice from contracting officials, (5) the confusion could have been easily resolved, and (6) exclusion of Pride would have left only one offeror, we believe that the contracting officer would have acted improperly if, without first holding further discussions or requesting clarification, he had found Pride's proposal to be unacceptable on the basis of the uncertainty as to the EPA provisions. See Data Systems Division of Litton Systems, B-208241, Sept. 29, 1982, 82-2 C.P.D. ¶ 297 (proposal was improperly found to be unacceptable after best and final offers where alleged deficiencies concerned requirements which offeror either essentially met or as to which the agency never clearly communicated its concerns and the failure to meet was readily resolvable). In other words, we do not believe Pride's proposal had to be rejected for the reasons put forth by Amarillo."

In its request for reconsideration, Amarillo alleges that, although Pride's letter of May 24 explaining that the telex was prompted by agency advice indicated that copies had been sent to Amarillo and DLA, Amarillo never

received a copy of the letter and it was unlikely that DLA received a copy. Amarillo also argues that there is no clear indication that Pride's offer was indeed evaluated under the EPA provisions for manufacturers or, if so evaluated, whether the contracting officer intended to apply or correctly applied those provisions. Finally, Amarillo contends that there is no indication as to how the reference price Pride initially submitted as a fixed base operator/refueling agent was determined.

We find Amarillo's arguments to be either unpersuasive, untimely or irrelevant. Although DLA, in its response to the request for reconsideration, states that its records do not indicate receipt of Pride's May 24 letter explaining why Pride submitted the telex requesting evaluation as a fixed base operator/refueling agent, we note that the agency has still not disputed Pride's explanation that dispatch of the telex was at the urging of agency officials. To the extent that Amarillo means to suggest by its contentions in regards to the agency evaluation of Pride's offer that Pride's offer should not have been evaluated under the provisions for manufacturers, we consider this to be a mere reiteration of the arguments previously considered and rejected. To the extent that Amarillo suggests that the evaluation of Pride's offer was otherwise improper, we consider the allegation to be untimely, since it was filed more than 10 working days after Amarillo knew the alleged basis for it, i.e., the agency discussion of the evaluation of Pride's offer in DLA's April 1984 administrative report responding to this protest and in DLA's June 19 letter to our Office (with copies to Amarillo and Pride indicated). See TRS Design & Consulting Services, B-214011, May 29, 1984, 84-1 C.P.D. ¶ 578 (where protester supplements its original timely protest with a new ground of protest more than 10 working days after the basis for it should have been known the new ground is untimely and will not be considered on the merits); see also, 4 C.F.R. part 21 (1984). As for Amarillo's challenge to the reference prices initially submitted by Pride under the EPA provisions for fixed base operators/refueling agents, not only is this likewise untimely, but, in any case, we fail to see the relevance of those prices since all parties have agreed that Pride is in fact a manufacturer of refined petroleum products.

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Untimely raised new grounds of protest provide no basis for reversing or modifying a prior decision. Any other conclusion would permit a protester to present its case in a piecemeal fashion and to disrupt procurement of necessary goods or services for an indefinite time. Cf. Cal Pacific Fabricating, Inc.--Request for Reconsideration, B-214946.2, June 28, 1984, 84-1 C.P.D. ¶ 689 (information available to protester at time of protest is not information not previously considered such that it might justify reconsideration of prior decision).

Since our Office will not reverse or modify a prior decision where, as here, the protester fails to provide new evidence or legal arguments which show that the decision was erroneous, see Culp/Wesner/Culp--Reconsideration, B-212318.2, Mar. 26, 1984, 84-1 C.P.D. ¶ 346; 4 C.F.R. § 21.9(a) (1984), we affirm the prior decision.


for Comptroller General
of the United States